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IN THE

[redacted]

October Term, 2021

J. WYATT SHAINER, d/b/a
WYATT TIRE DISTRIBUTORS,

Cross-Petitioner,

v.

UNIROYAL, INC.,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 81-2158

IN THE

Supreme Court of the United States

October Term, 1981

J. WYATT SKAINES, d/b/a WYATT TIRE DISTRIBUTORS,
Cross-Petitioner,

v.

UNIROYAL, INC.,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Order Below

Respondent, Uniroyal, Inc., seeks denial of certiorari to cross-petitioner (plaintiff below) J. Wyatt Skaines, d/b/a Wyatt Tire Distributors, for review of the Amended Order of the United States Court of Appeals for the Sixth Circuit filed January 22, 1982, in this price discrimination case which reduced and remitted the special jury verdict for loss of future profits from $205,200 to $30,000 subject to the option of cross-petitioner for a new trial as to damages.*

* Uniroyal's original petition in this case, No. 81-1949, also addressed, *inter alia*, the question of lost future profits as a measure of damage in Robinson-Patman cases. That petition was denied by this Court by Order entered June 14, 1982.

Counterstatement of the Case

Petitioner seeks to reinstate the jury's special verdict for loss of future profits based on a profit projection for Skaines' first year of business and his prospective 25-year business life. In that first year, however, and unencumbered by any "favored" competitor, Skaines realized a loss rather than the profit predicted in the projection.

For the most part, petitioner's statement of the case is not germane to the single issue presented in his cross-petition but reflects continuing arguments as to liability issues which were resolved in a state court action in Uniroyal's favor. Thus, as a result of rulings of the state court, Skaines was precluded from rearguing allegations relating to breach of contract and failure to supply adequate merchandise or to extend credit. The case below was tried solely on Robinson-Patman issues of liability and damage.

Nor does Section L of petitioner's "Statement" (p. 15) set forth accurately the damages claimed at trial. In fact, damages were alternatively computed (and charged by the court) for a two month or a seven month period of time depending upon the jury's determination as to when the favored customer, United Tire, became a wholly owned subsidiary of Uniroyal thereby terminating any question of Robinson-Patman violation. *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979), *cert. den.*, 444 U.S. 942 (1979); cf. *Parrish* v. *Cox*, 586 F.2d 9 (6th Cir. 1978).

Insofar as now relevant, Skaines' claimed damages were:

	2 months	*7 months*
(a) loss of profit on sales to customers diverted to United	$ ——	$ 3,476.00
(b) price differentials	$ 16,969.00	$ 22,293.46
(c) loss of future profits	$336,400.00	$336,400.00

Without dwelling on the court's charge to the jury as it related to recovery of price differentials and future profits, the jury returned the following special verdicts:

(a) loss of profit on sales to customers diverted to United	$ 1,150.00
(b) price differentials	$ 16,969.00
(c) loss of future profits	$205,200.00

The District Court trebled the aggregate of these verdicts and, without hearing Uniroyal, awarded and added attorneys' fees of $106,250.

The Court of Appeals approved the handling by the District Court of the principal liability issue of whether there had been discriminatory pricing of goods (tires) of "like grade and quality" and the special verdict of $16,969 in price differentials despite (a) the special—and duplicative—verdict for the "actual" loss sustained through diverted sales and (b) this Court's recent admonishment against "automatic" damages in *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corporation*, 451 U.S. 557 (1981). However, the third special verdict for loss of future profits was reduced and remitted from $205,200 to $30,000 subject to

Skaines' right to a new trial as to damages if he did not accept the remittitur. (The Court of Appeals did not address but accepted without comment the $106,250 counsel fee awarded by the District Court despite its drastic reduction of the aggregate single damages from $223,319 to $48,119.)

In ordering the remittitur which petitioner would have this Court review, the Court of Appeals stated in part:

> The problem that we face in this case is similar to that faced by the Courts in . . . [citations] . . . In all instances, the jury was asked to speculate on the length of time that a plaintiff would have had a thriving business in the absence of the antitrust violation when the evidence only showed that the plaintiff lost money during the entire time of his venture. In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence. The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized sales greater than $25,000 for the first year [*sic*] of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Unless Appellee agrees to remit $525,600 within thirty days of the entry of the order, the District Court should grant a new trial limited to the issue of damages.

The Court of Appeals thus correctly summarized the record and the cross-petition does not really take issue with these findings.* In addition to the panel's observation, it is undisputed that Skaines had not tested his entrepreneural skills in the marketplace prior to beginning his tire business and actually—against a budgeted profit—sustained a loss during his first year of operation, a point in time when there was no favored customer. Moreover, the budget itself contained a specific disclaimer as to the accuracy of its projections.

That the jury concluded that the period of unfair competition lasted from mid-August of 1969 when United Tire began business to mid-October of 1969 when Uniroyal acquired United Tire and its employees became Uniroyal employees is clear from its verdict of $16,969 for price differentials, precisely the figure Skaines calculated for those eight weeks. During this time frame, Uniroyal granted Skaines an additional $10,000 inventory credit and Skaines sustained his best ever sales in September. The jury award of $205,200 in lost future profits for two months of price discrimination totalling $16,969 and causing only $1,150 of actual lost profits is grossly—and reversibly—excessive.

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* That the panel below may have inadvertently said "first year" instead of "first quarter" (Pet. p. 22) comes to no more than quibbling.

Reasons to Deny the Cross-Petition

With the denial of Uniroyal's petition, No. 1949, there is no added reason to grant the present cross-petition, although it remains that lost future profits have not served as a damage model in any reported Robinson-Patman case to date.

In *Payne, supra,* this Court emphatically rejected the award of "automatic" damages measured simply by totalling the aggregate dollar amount of provable price differentials in favor of proof of "actual" damage through lost sales or reduced prices. It is, therefore, at least arguable, we submit (and did in No. 1949), that hypothetical (or theoretical) damages for lost *future* profits *after* all Robinson-Patman violations have ceased fall beyond the *Payne* mandate that only *actual* damage is to be assessed.

Be that as it may, the Sixth Circuit allowed both "actual" and "automatic" verdicts to stand* and, through remittitur, in effect suggested petitioner accept either $30,000 in lieu of the excessive lost future profit verdict of $205,200 or a new damage trial. (Petitioner, by accepting the remittitur, may still gain, through trebling, seven years of future profit as measured by the $13,000-plus profit projected—but not attained—for his first year's operation.)

This Court, as noted, has already declined to review the overall disposition below. In any event, the reasons now advanced by the cross-petition for review of the remission of the lost future profit award lack substance.

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* Duplicate recoveries are, in and of themselves, cause for remittitur, *R.E.B. Inc.* v. *Ralston Purina Co.,* 525 F.2d 749 (10th Cir. 1975).

I

Remittitur of an Excessive Jury Verdict Does Not Infringe the Seventh Amendment to the Constitution.

Cross-petitioner's assertion in this regard is all but frivolous, at least in this day and age. See, *e.g.*, dicta in *Dimick* v. *Schiedt*, 293 U.S. 474, 482-3 (1935). The panel below in ordering remittitur was well within Sixth Circuit precedent. See, *e.g.*, *Flame Coal Co.* v. *United Mine Workers of America*, 303 F.2d 39, 47 (6th Cir. 1962), *cert. den.*, 371 U.S. 891, and note cases collected in *Wicks* v. *Henken*, 378 F.2d 395 (2d Cir. 1967). Indeed, remittitur, with the option of a new *jury* trial, must now be seen as simply a discretionary alternative afforded by appellate courts, federal and state, at the party's election to waive a second jury trial in favor of certainty, time and economy. Cf. Wright & Miller, 11 Federal Practice and Procedure, §2820, pp. 128-131; 50 C.J.S., Juries, §128e, pp. 855-6. Consider: 28 U.S.C. §2106.

Professor Moore has summarized remittitur practice as it has developed as "so universal in the trial and even the appellate courts and has the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by *Erie-Tompkins.*" 6A Moore's Federal Practice ¶59.05[3], p. 59-49 (noted citations omitted).

Thus, petitioner's principal point is, at best, moot.

II

The Appellate Panel Correctly Found Such "Paucity of the Evidence" as to Dictate Its Remittitur.

Petitioner's lost future profit theory as presented at trial was based uniquely—at least in reported Robinson-Patman jurisprudence—on the circumstance that Skaines was forty when he gave up his tire dealership. Thus, he claimed to have been economically maimed for the balance of his business life or until his expected retirement at 65. No Sherman Act termination case to our knowledge has presented a jury with such an impermissibly speculative range from which to award the *actual* damage prescribed by *Payne*. The remitted award of $30,000 stands in vivid contrast to the jury's award of $1,150 for the *actual* profit lost in diverted sales.

To predicate damage on a proprietor's business life expectancy moves somewhere beyond speculation into sheer caprice, hardly the stuff of reasonable estimation long recognized (and adverted to in *Payne*) as permissible in Sherman Act cases where monetary damage is often imprecise. See, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). But there was no evidence as to Skaines' profit-making ability in any other business from which the credibility of the projection could be judged; there was no proof of profit performance of any comparable business in the Memphis market; and, in fact, Skaines had a loss in his first year which ended before United started in business and, thus, before any of the claimed discrimination occurred.

Nor was there evidence that Skaines would have continued in business for 25 years, a necessary predicate to finding loss of profits over that period of time. On the contrary, since his franchise was, by its express terms, terminable by either party upon 30 days' written notice, there was just no basis for believing the business would continue for a generation.*

Assuming, but not conceding, that lost future profits, *per se*, may be recovered in a Robinson-Patman action, there still must be sufficient evidence from which the amount of lost profits can be determined with a fair and reasonable degree of certainty, without speculation or conjecture. *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 677-678 (10th Cir. 1977); *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753, 769 (6th Cir. 1965); *Elder-Beerman Stores Corp.* v. *Federated Department Stores, Inc.*, 459 F.2d 138, 150 (6th Cir. 1972); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1351-1352 (3rd Cir. 1975). In *Volasco Products Company* v. *Lloyd A. Fry Roofing Company*, 346 F.2d 661, 666 (6th Cir. 1965), *cert. den.*, 382 U.S. 904 (1965), the mathematical projection at issue was based on the plaintiff's prior business history, unlike the projection in the instant case, which is totally conjectural.

To award antitrust damages based on projected profits, there must, at the least, be a tangible foundation from which the fact finder can determine that a reasonable probability exists that profits would have been made. *Webb*, *supra*, 568 F.2d at 677. A mere estimate of lost profits

* On remand in *Payne*, the Fifth Circuit rejected, as a damage concept, expert testimony as to going concern values projected for 20 years. 670 F.2d 575 (1982).

cannot be sufficient in this respect, especially where (as in the instant case) there never were any profits. See *Baush Machine Tool Co.* v. *Aluminum Co. of America,* 79 F.2d 217 (2d Cir. 1935).

In *Albrecht* v. *Herald Company,* 452 F.2d 124 (8th Cir. 1971), the Court, at 131, stated:

> Certainly the anti-trust laws in dealing with damages are not intended to give a person a life annuity in addition to whatever actual damage a party might have suffered in its business property. *The injury is to the business and not to the person.* (Emphasis supplied.)

In *Simpson* v. *Union Oil Company of California,* 411 F.2d 897 (9th Cir. 1969), *rev'd on other grounds,* 377 U.S. 13 (1969), the trial court's disallowance of lost future profits based on the plaintiff's projection of earnings over his life expectancy was affirmed because the plaintiff there, as with Skaines here, had not been personally disabled or otherwise rendered unable to earn an income for his remaining life.

In the instant case, Skaines' claim for lost future profits, as submitted to the jury, was $336,400, and the jury award was $205,200. Since the District Court did instruct the jury to discount damages for lost future profits to present value, it appears that the jury based its award on something approaching 25 years. The appellate panel then provisionally reduced this verdict, in effect, to $30,000.

The fundamental and fatal error lay in inviting the jury to speculate on anything as irrational as a 25-year life expectancy in the first place. Indeed, no part of an award proceeding from such induced speculation should have been allowed to stand.

It is submitted that the trial judge or the appellate panel could at least have ordered a new trial as to damages; surely remittitur was a justifiable, constitutional alternative to put to petitioner's option.

Conclusion

Although the clear mandate of *Payne* was palpably averted in the affirmance of the "automatic damages" awarded Skaines for price differentials and further muddied in the allowance of some lost future profits as, presumably, additional *actual* damage—and with all now standing as condoned by this Court's denial of Uniroyal's petition in No. 1949—the cross-petition should now also be denied.

Respectfully submitted,

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